APPEAL NO. 93181

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held on February 1, 1993, in (city), Texas, (hearing officer) presiding as the hearing officer. He determined that the respondent (claimant) was entitled to supplemental income benefits for the compensable quarter beginning September 25, 1992. Appellant (carrier) urges that the decision be reversed as there was no evidence that the claimant was unemployed or underemployed as a direct result of the impairment from the compensable injury and there was no evidence of a good faith effort on the part of the claimant to find employment commensurate with his ability to work. Claimant cites evidence in the record to support the hearing officer's decision and to counter the carrier's "no evidence" assertions, and asks that the decision be affirmed.

DECISION

Finding evidence to support the decision of the hearing officer and to overcome the no evidence challenge of the carrier, we affirm.

The issue in this case involved the claimant's entitlement to delayed supplemental income benefits (SIBs) pursuant to Article 8308-4.28 and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.105 (TWCC Rule 130.105), for the period "9/11/92" through "12/10/92." Under those provisions, a claimant, to be entitled to SIBs, must, among other things, make a good faith attempt to obtain employment commensurate with his ability to work or, if otherwise entitled because of unemployment or underemployment and earnings less than 80% of preinjury wages, establish that such decreased earnings are a direct result of his impairment from the compensable injury. It is on these two bases that the carrier urges that SIBs are not due.

The claimant sustained an injury to his neck, shoulder, and upper back on (date of injury), and began receiving benefits under the 1989 Act. He was subsequently determined to have reached maximum medical improvement and was assessed with a 17% impairment rating. The time frame of these events is not clear in the record; however, the claimant testified that at the end of his impairment income benefits, he became eligible for SIBs but that during the first quarter, his SIBs were denied because he did not show a good faith effort to obtain employment. He was under some work restrictions including a 50 pound lifting maximum with 25 pounds being "OK." At about the time he was denied SIBs for the first quarter, he got a job during the last part of June 1992, at wages somewhat less than the wages he previously earned. Although not clear in the record, it appears the greater part of the reduced wage was because he worked considerable overtime and long hours at his preinjury job. In any event, he got the job in question, a company performing pest control and tree services, through his brother-in-law, whom claimant had advised he was looking for some work. The claimant testified that the job was a full time job although there were some slack periods when he would be on call but not paid. He did not attempt to look for another job or get a second job or other part time employment during this period and

indicated the job was physically demanding insofar as he was tired at the end of the day. He felt that his former ability to work longer hours was reduced because of his compensable injury for which, he stated, he was still under a doctor's care. Because of the seasonal nature of the work, he was "laid off" about September 11, 1992. He states he looked for other employment including looking at the want ads, both before and after the job with the pest control and tree service company, but wasn't able to find anything within his limitations. He stated that he had applied at one place but apparently was not given a job because of his limitations. He testified that he had a ninth grade education and had been mostly a laborer. He admitted that he never called anyone as a result of the want ads stating that most were minimum wage jobs or sales jobs or trade jobs "I probably couldn't have done under my restriction." He also stated that he did not go to the Texas Employment Commission or the Texas Rehabilitation Commission during this time period. When the carrier introduced and went over the want ads for one weekend during the period in question, the claimant indicated he "may have overlooked" jobs that appeared to be within his capabilities.

From this evidence, the hearing officer found that during the period in issue, the claimant was unable to obtain other employment because of his physical limitations and that he made a good faith effort to obtain employment commensurate with his ability to work. The hearing officer states in his decision that

> [i]n this case, the Claimant actually obtained employment within his limitations. The fact that he was lucky to get the job at all should not be used to punish him. If his Employer cannot put him back to work within his physical limitations, a lucky break from his brother-in-law should not be held against him. It does not seem reasonable that he should be required to look for a better job while doing the job he is lucky to get.

While we find of questionable appropriateness such comments and inartful language in this part of his decision, it is apparent the hearing officer was satisfied that the evidence sufficiently satisfied the two matters in issue. While the claimant's job search may appear to have been minimal, we cannot say there is no evidence from which the hearing officer could find a good faith effort, or that the employment the claimant did obtain in this case required him to look for higher paying employment or a second job.

Regarding the carrier's no evidence point, we have held, in accordance with Texas case authority, that a reviewing body should consider only the evidence and reasonable inferences therefrom which support the finder of fact, and reject all evidence and inferences to the contrary. Texas Workers' Compensation Commission Appeal No. 91002, decided 7 August 1991. *See also* Nassar v. Security Insurance Co., 724 S.W.2d 17 (Tex. 1987). The testimony of the claimant in this case, if believed, is evidence tending to establish the matters in question. The decision of a hearing officer, as the fact finder under Article 8308-6.34(g), will be set aside only if the evidence supporting the hearing officer is so weak or so

against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The trier of fact may or may not accept the testimony of the claimant and he may weigh it along with other evidence. Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). Reviewing the evidence of record, we find there is evidence to support the hearing officer, and further, we cannot conclude that the evidence supporting his findings is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. *See generally* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992; Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992.

We do not find authority or persuasive argument for the carrier's position that while the claimant was employed full time (although there were occasional slack periods in the job, claimant stated that this also occurred in his preinjury job even though that job normally covered considerably longer work days and weeks), he was required to seek a second job or other part time position. He testified that the job he got, although at lesser wages, was full time, that he was tired from the physical demands of the job at the end of the work day, and that he was not, as a result of his on the job injury, able to work as long or as hard now. We are not able to determine there was a substantial absence of good faith on the part of the claimant, during this period of time that he was actually employed, to seek employment commensurate with his limitation. And, apparently because he was employed during virtually the whole period in which his entitlement to SIBs was being assessed, the hearing officer determined the claimant made a good faith effort to obtain employment commensurate with his ability to work. As we indicated, the efforts appear to us to be minimal and a different result might be reached if the claimant had been unemployed during the entire period and had made the somewhat limited efforts he described in his testimony to seek a job. "Good faith" is defined in Black's Law Dictionary, Sixth Edition, West Publishing Co. 1990 thusly:

> Good faith is an intangible and abstract quality with no technical meaning or statutory definition and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone.
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> In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation.

Under the circumstances presented, we will not substitute our judgment for that of the fact finder since he is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e) However, we caution that the 1989 Act establishes certain duties and obligations on the part of an injured party to obtain and retain entitlement to benefits. Seeking employment as reasonably soon as is warranted and within any limitations resulting from a compensable injury is a general prerequisite for entitlement to SIBs. An injured employee is required to make a good faith effort in this regard and the hearing officer so found here. For the reasons set out above, the decision to award SIBs for the period in issue is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge